No. 94-1837

(9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N. A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
JAMES R. HEAVNER, JR.
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

Attorneys for Petitioner

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PETITIONER'S REPLY BRIEF

INTRODUCTION

In their brief in opposition, the respondent insurance agent organizations — the private parties who intervened

below to prevent petitioner Barnett Bank and other similarly situated banks from acting as insurance agents in Florida — *agree* with Barnett Bank that there is a conflict among the circuits over whether the McCarran-Ferguson Act preserves from preemption state laws that prevent small-town national banks from acting as insurance agents as authorized by 12 U.S.C. § 92. The insurance agents further agree that the issue is one of national importance, and that this case is the appropriate one, among the three presenting the issue that are now before the Court, in which to resolve the issue. [1]

The Solicitor General, representing the United States and the Comptroller of the Currency as *amici curiae* supporting Barnett Bank, concurs with Barnett Bank and the insurance agents on these points. Many banks and banking associations have also appeared as *amici curiae* in support of Barnett Bank, emphasizing the directness of the conflict, the importance of the issue, and the suitability of this case as a vehicle for resolving it.

Amidst this striking unanimity among the responsible federal authorities and the affected private interests on both sides of the dispute, the only discordant note is struck by the state governmental respondent, the Insurance Commissioner of the State of Florida. [2] In his brief in opposition, the Insurance Commissioner, alone among all those directly or indirectly interested in the outcome of this case, denies that

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[1] The other two are *Stephens, et al. v. Owensboro Nat'l Bank, et al.*, No. 95-74 (filed July 13, 1995), and *First Advantage Ins., Inc., et al. v. Green, et al.*, No. 94-2130 (filed June 27, 1995).

[2] We are informed that Bill Nelson has replaced Tom Gallagher as Insurance Commissioner for the State of Florida. In accordance with the governing rules, the caption of petitioner's reply reflects the automatic substitution of Mr. Nelson as a respondent in this proceeding.

there is a genuine conflict among the circuits or an issue otherwise worthy of the attention of this Court. The Insurance Commissioner's effort to paper over the conflict, however, rests on false distinctions and would require this Court simply to ignore the holdings and rationales of the decisions at issue.

The conflict is a real one — indeed, one that has already worsened since we filed our petition for certiorari. The substantial issue presented requires resolution by this Court.

ARGUMENT

A. The Conflict is Genuine.

The Insurance Commissioner begins by asserting that the decision below is not in conflict with the Sixth Circuit's decision in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), because the Kentucky statute at issue in *Owensboro* "only prohibits insurance sales by persons who own a majority interest in the financial institution," and permits "[a] bank with fractured ownership" to sell insurance. Ins. Com. Br. Opp. 9. But the Sixth Circuit, in deciding *Owensboro*, accepted, for purposes of its analysis, the State of Kentucky's position that the statute "applies not only to bank holding companies, but also to subsidiaries thereof, such as national banks." 44 F.3d at 390.

Moreover, the Commissioner's "distinction" ignores that Florida's supposedly "more protective" statute itself does not apply to all national banks in towns under 5,000, but only to those owned by holding companies. Thus, both *Owensboro* and the decision below addressed statutes of virtually identical effect: statutes that purport to forbid small-town national banks owned by holding companies from

engaging in the insurance agency activities allowed by 12 U.S.C. § 92.

More broadly, the Insurance Commissioner tries to distinguish this case from *Owensboro* by painting the decisive question as one of fact turning on the motive of the legislature in enacting the statute at issue. To be sure, the trial court heard evidence in this case about the purpose of the Florida statute, and the Eleventh Circuit based its holding in part upon assertions about the purpose of the statute that it found relevant to its legal analysis. The Sixth Circuit, by contrast, decided *Owensboro* on appeal from a decision granting summary judgment, and held *as a matter of law* that a law forbidding a bank to operate an insurance agency is not a law regulating the business of insurance.

Therein lies the conflict. Under *Owensboro*, the evidence of purpose relied on by the Eleventh Circuit below is simply not material to the inquiry under the McCarran-Ferguson Act. Thus, the difference between the outcome in *Owensboro* and the outcome below did *not*, as the Insurance Commissioner suggests, result from factbound differences between two courts' assessment of evidence of legislative intent. Rather, the different results were due to a fundamental disagreement about a legal issue: what it means for a law to "regulate the business of insurance."

B. *First Advantage* Underscores the Conflict.

The Insurance Commissioner goes even farther afield in contending that the outcome in *First Advantage Ins., Inc. v. Green*, 652 So.2d 562 (La. Ct. App.), *cert. denied*, 654 So.2d 331 (La. 1995), "shows that courts are applying the principles set forth by this Court's precedents, along with the analyses in *Owensboro* and *Barnett*, to the statutes before them and arriving at fair and reasoned decisions based upon

factual determinations of each statute's purpose." Ins. Com. Br. Opp. 12.

Far from it. Contrary to the Commissioner's assertion, the Louisiana court in *First Advantage* did not find the Eleventh Circuit's decision in this case to be "factually and legally distinguishable" from *Owensboro*. Ins. Com. Br. Opp. 9. Nor did that court, as the Insurance Commissioner suggests, render a fact-based decision reconcilable with both *Owensboro* and the Eleventh Circuit's decision in this case. Rather, the *First Advantage* court explicitly recognized that the decision below and *Owensboro* reflected "[c]onflict in [the] Federal Courts" (652 So.2d at 574), and that in order to decide the case, it had to choose between the divergent legal approaches of the two cases. 652 So.2d at 576. The court went on to observe (652 So.2d at 577):

> The issues raised in this appeal are the most recent conflicts in the long running turf battle on the part of two powerful industries, namely banking and insurance, each of which is subject to governmental regulation. The jurisprudence reveals that these battles are occurring in states around the country, and different courts are arriving at different results. Ultimately, the various questions raised will have to be answered by the United States Supreme Court.

The Louisiana Supreme Court's denial of certiorari in *First Advantage* (which was reported after our petition for certiorari was filed) confirms that there is a growing conflict on the issue presented by this case: whether the McCarran-

Ferguson Act saves state statutes that prevent national banks from exercising their powers under 12 U.S.C. § 92. [3]

C. The Court Should Take a Case in Which Both Prongs of the McCarran-Ferguson Issue Have Been Addressed.

The Insurance Commissioner further suggests that the Eleventh Circuit's holding on the second prong of the McCarran-Ferguson issue — that is, whether the federal statute permitting national banks to sell insurance "specifically relates to the business of insurance" — does not merit this Court's attention because there is no explicit conflict among the courts of appeals on this point.

It is, of course, true that the Sixth Circuit in *Owensboro* did not reach this issue. Nonetheless, definitively resolving the conflict over the application of McCarran-Ferguson to state statutes prohibiting national banks from selling insurance may require consideration of both parts of the McCarran-Ferguson analysis. Both the Solicitor General and the insurance agent respondents agree that this Court should take up a case in which both questions have been addressed.

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[3] Since our petition was filed, a petition for certiorari has been filed in the *First Advantage* case, pointing out the same conflict presented by our petition. *See First Advantage Ins., Inc., et al. v. Green, et al.*, No. 94-2130 (filed June 27, 1995). In that petition, counsel for First Advantage assert that that case is more "ripe" for consideration than this one, because the action of the Louisiana Insurance Commissioner in that case stripped an insurance agent associated with the bank of his license. Without questioning the ripeness of the dispute in *First Advantage*, we point out that this case, involving an action of the Florida Insurance Commissioner that restrains otherwise licensed insurance agents from selling insurance because of their association with Barnett Bank, is equally ripe.

D. The Issue Is Important.

Finally, the Court should discount the Insurance Commissioner's efforts to denigrate the national importance of the issues presented by this case. The Insurance Commissioner's primary interest, after all, is in defending his own state's statute. The uncertainty affecting the banking and insurance industries in other states is of little direct concern to him. A far better indication of the importance of the case is that both banking and insurance agent organizations whose members are directly affected by the conflict (and whose positions on the merits are directly opposed) agree that the issue requires resolution by this Court.

That the interested private industries are joined by the Solicitor General and the Comptroller of the Currency in urging the Court to address the issue only emphasizes its significance. The Insurance Commissioner's odd suggestion that the Comptroller's views should receive little weight because he "only" appeared as an *amicus curiae* below, rather than intervening, should be laid to rest by the decision of the Solicitor General and the Comptroller to file an *amicus* brief in this Court — without waiting for an invitation from the Court — urging the Court to grant certiorari.

CONCLUSION

For the foregoing reasons, as well as those previously set forth, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
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RICHARD E. SWARTLEY
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